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PRESIDING OFFICER'S  
RULING NO. C99-1/9

POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Complaint on Post E.C.S.

Docket No C99-1

PRESIDING OFFICER'S COMBINED RULING ON  
OUTSTANDING MOTIONS OF UNITED PARCEL SERVICE  
TO COMPEL RESPONSES BY UNITED STATES POSTAL SERVICE  
TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

(August 9, 1999)

This ruling addresses four outstanding motions<sup>1</sup> filed by Complainant to compel responses by the Postal Service to various interrogatories and requests for production of documents. As the parties are aware, Presiding Officer's Ruling No. C99-1/3—which has recently been clarified by the Commission in Order No. 1258—determined that this proceeding will be considered in phases, with the first phase limited to the issue of whether Post E.C.S. service is a postal service for purposes of Chapter 36 of Title 39. In accordance with that determination, the ruling also established that discovery and other fact finding will be limited to the "postal" versus "non-postal" issue at this stage of the proceeding, with discovery on more commercially sensitive topics to be deferred to possible later phases of the case. On the basis of these procedural limitations, this ruling will focus on the extent to which the controversial discovery requests of

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<sup>1</sup> Motion of United Parcel Service to Compel United States Postal Service to Respond to Interrogatories UPS/USPS-1 through UPS/USPS-7 and UPS/USPS-9 through UPS/USPS-20, June 8, 1999; Motion of United Parcel Service to Compel Answers to Interrogatories UPS/USPS-25 through UPS/USPS-33, June 25, 1999; Motion of United Parcel Service to Compel Answers to Interrogatories UPS/USPS-34 and 36 through 43, July 20, 1999; and Fourth Motion of United Parcel Service to

Complainant bear directly on matters at issue in this phase of the proceeding. Denial of any part of a motion is without prejudice to Complainant's potential opportunity to resubmit the discovery request in a subsequent phase of this case, should it occur.

UPS/USPS-1(b)—(c) and 7. These interrogatories seek information regarding the particular Postal Service organizational units and personnel (by job title, not identity) who have been involved with Post E.C.S. service. The Service objected on the grounds that the interrogatories constitute invasive attempts to unearth information about decisionmaking processes within the Postal Service, which would be of commercial value to competitors, and that they seek information of no relevance to determining the status of Post E.C.S. In its Motion to Compel of June 8, Complainant argues that the requested information would shed light on the extent to which Post E.C.S. shares resources used in developing and providing conventional postal services, and denies that the interrogatories intrude upon the Service's deliberative processes or the participation of individual employees in those processes.

I agree with the Postal Service that the relevance of these interrogatories to establishing the "postal" or "nonpostal" character of Post E.C.S. service is tangential at best. While responsive information might shed some indirect light on Post E.C.S. by identifying its institutional origins and resource commitments, it would not illuminate the service itself. As the Service notes, the Presiding Officer in Docket No. C96-1 declined to compel the production of information in response to similar discovery requests, finding that "the decisional processes whereby the [Pack & Send] service was brought into being...have no bearing on the qualities of the service itself." P. O. Ruling No. C96-1/5 at 5. Consequently, I shall not direct the Postal Service to respond to these interrogatories.

UPS/USPS-36 through UPS/USPS-40. These interrogatories have similarities to the above, in that they ask whether any resources such as computer equipment, servers, computer programmers, and phone lines used in connection with the Post E.C.S. service are used for providing any other service. The Postal Service objected on the grounds of irrelevance, undue burden, and commercial sensitivity. In its Motion to Compel of July 20, Complainant argues that the use of common resources by two services suggests that they are similar, or even of the same basic "postal" nature. Additionally, UPS argues that the extent to which common inputs are used indicates the extent to which one service may cross-subsidize the other.

I agree with the Postal Service that the information sought in these interrogatories would be of minimal relevance to the issue to be addressed in this phase of the proceeding, namely the "postal" or "non-postal" character of Post E.C.S. service. The sharing of common resources with other services would only shed indirect light on the intrinsic features of Post E.C.S. Therefore, I shall not grant the motion to compel responses to these interrogatories. However, as Complainant argues, such information may have a bearing on the potential for cross-subsidy, and this denial is without prejudice to discovery in a later phase of this case.

UPS/USPS-42. This interrogatory cites a Report of the General Accounting Office (Report on New Postal Products, GAO/GGD-99-15) for the proposition that the Postal Service's electronic services have been operating at a loss, and asks the Service to identify the source of the revenues used to fund the reported loss. The Postal Service objected on the grounds that the interrogatory is vague, assumes facts that are not in evidence, and requests irrelevant information. In its Motion to Compel of July 20, Complainant argues that the requested information bears on its claim that the Service should have filed a request with the Commission for an advisory opinion under 39 U.S.C. § 3661 before introducing Post E.C.S. service, inasmuch as the revenues used to operate it come from other postal services.

I agree with the Postal Service that this interrogatory seeks information of no immediate relevance in this phase of the case. In addition to posing a shared-resource question similar to some of the interrogatories previously discussed, the interrogatory bears primarily on Complainant's third claim invoking 39 U.S.C. § 3661, as noted in its Motion to Compel. That claim is not being considered in this phase of the case, and consequently I shall not compel a response at this time.

UPS/USPS-5, 6, 10-12, 13, 14. These interrogatories request the production of a wide variety of documents, including planning, developmental, instructional, training, customer-solicitation, survey, contractual, and marketing materials concerning Post E.C.S. The Postal Service has objected to providing the various requested documents on the grounds of relevance, commercial sensitivity, and other privileges such as the attorney-client, work product, and deliberative process privileges. In its Motion to Compel of June 8, Complainant argues that many of the requested documents are likely to contain admissible information bearing on the issue of whether Post E.C.S. is a postal service, and whether it is a substitute for existing services. UPS also argues that the Service should be required to substantiate each of its claims of privilege with an itemized "privilege log."

A review of the categories of documents requested in these interrogatories suggests that at least some responsive documents are likely to contain material relevant to establishing the status of Post E.C.S. as a "postal" or "non-postal" service. However, the Postal Service's claims of privilege are also plausible, if somewhat generalized. In order to clarify and focus the evidentiary status of documents responsive to these interrogatories, I shall direct the Postal Service to prepare and file a list specifying the particular privilege claimed for each category of document requested. I will expect the Postal Service to report on its progress in preparing this list during the prehearing conference to be held on August 10. Following receipt of this list and any accompanying argument of the Postal Service, and an opportunity for response by

Complainant, it will be possible to rule on the particular discovery requests made in these interrogatories.

UPS/USPS-27-28, 30, 43. These interrogatories ask for certain operating details of Post E.C.S. service. The first requests an exact description of how a message sent by a USPS-licensed Post E.C.S. user to a foreign addressee is transmitted; the second asks for the location of the server from which an addressee retrieves the message in such a transaction. UPS/USPS-30 asks when, in the Postal Service's view, a Post E.C.S. message has been "delivered" to the addressee. UPS/USPS-43 asks whether the sender of a Post E.C.S. message is obligated to pay the Postal Service when the message is lodged on the server, whether or not the recipient retrieves it.

The Service objected to these interrogatories on the grounds of lack of relevance, and in the case of UPS/USPS-30, because the issue "is the subject of ongoing negotiation between the Postal Service, the foreign posts, and the service provider." Postal Service Objection of June 18 at 3. (Footnote omitted.) In its Motions to Compel of June 25 and July 20, UPS argues that responsive information would be relevant to determining whether Post E.C.S. messages are ever "delivered" outside the United States in manner that would render them "mail matter conveyed between the United States and other countries"—*i.e.*, international mail matter—under 39 U.S.C. § 407. I agree with Complainant that responses to these operational questions may lead to the production of admissible evidence on the "domestic" versus "international" component of this phase of the case, which the Commission recently recognized in Order No. 1258. Also, while the topic of UPS/USPS-30 may be the subject of ongoing negotiation, the Service's position on the issue is significant to potential users of Post E.C.S., and should be publicly disclosed. Therefore, I shall grant Complainant's motion to compel responses to these interrogatories.

UPS/USPS-26, 29, 45. These interrogatories ask about the Postal Service's licensing of Post E.C.S. users who are non-U.S. companies or citizens, are not physically located within the United States, or who have a "foreign" top level domain in

the domain name of its e-mail address.<sup>2</sup> The Postal Service objected on the grounds of relevance, commercial sensitivity, and, in the case of UPS/USPS-45, vagueness. In its Motions to Compel of June 25 and July 29, UPS argues that responsive information would be relevant to the Service's claim that there is no domestic component of Post E.C.S. subject to the Commission's jurisdiction, and that provision of sensitive portions under protective conditions would be acceptable.

I agree with the Postal Service that the relevance of the requested information about Post E.C.S. licensees is too attenuated to warrant compelling its production. As Order No. 1258 indicates, the Commission's inquiry into the "domestic" versus "international" issue is focused on establishing whether there is "an appreciable segment of Post E.C.S. *transactions* that are wholly domestic," in order to determine the potential applicability of Chapter 36 to those transactions. Order No. 1258 at 5. (Emphasis added.) The extent to which there are non-domestic *users* of Post E.C.S. has no bearing on this question. Consequently, I shall not compel the Postal Service to respond to these interrogatories.

UPS/USPS-25, 32-33. The first interrogatory asks whether any Postal Service employee or representative has made a sales visit or presentation on Post E.C.S. outside the United States, and to describe each such occurrence. The latter two interrogatories asks whether the Postal Service makes payments to foreign posts or other entities or individuals when Post E.C.S. is used in specified international transactions. The Service objected to these interrogatories on the grounds of relevance, privilege, and commercial sensitivity. Complainant argues in its Motion to Compel of June 25 that the requested information bears on the Postal Service's

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<sup>2</sup> Examples of "foreign" top-level domain (TLD) designators would include the "de" in [www.deutschepost.de](http://www.deutschepost.de) (indicating a host address in Germany) and the "uk" in [www.harrods.co.uk](http://www.harrods.co.uk) (indicating a host address in the United Kingdom). For a currently comprehensive list of these "country codes," see: [www.ics.uci.edu/pub/websoft/wwwstat/country-codes.txt](http://www.ics.uci.edu/pub/websoft/wwwstat/country-codes.txt). By contrast, "global" top-level domains consist of Internet addresses ending in ".com," ".net," ".org" and ".edu."

assertion that Post E.C.S. is international in nature, and that potentially sensitive information can be accommodated by application or protective conditions.

As with the preceding group of interrogatories, I find the requested information lacking in relevance to the current inquiry into the purportedly "international" character of Post E.C.S. Information concerning international marketing efforts by the Postal Service would contribute little if anything to identifying the domestic-versus-international segments of Post E.C.S. While knowing the conditions under which the Service makes payments to foreign posts might shed light on how other postal administrations view services such as Post E.C.S., the expectation of payment for Post E.C.S. transactions is outside the scope of consideration in this phase of the proceeding. Accordingly, I shall not compel responses to these interrogatories.

UPS/USPS-2, 3(b)-(c), 4, 20(a), 31 and 44. These interrogatories request the total number of Post E.C.S. transactions to date; a breakdown of transactions according to domestic and non-domestic origination, server transit and storage, and receipt; and the percentage of total Post E.C.S. transactions by Postal Service licensees addressed to a foreign top level domain. The Service objected to the first four of these interrogatories on the grounds of commercial sensitivity, relevance and lack of jurisdiction. With respect to UPS/USPS-44, the Service cited the additional grounds of vagueness and undue burden.

In support of its claim of irrelevance, the Service cites the action of the Presiding Officer in Docket No. C96-1, in which he sustained Postal Service objections to the relevance of discovery requests for volume and revenue data. With respect to the specific information sought in UPS/USPS-44, the Service argues that responsive information would be meaningless because a separation of transactions directed to Internet addresses with "foreign" top-level domains from those transactions directed to other top-level domains would not necessarily segregate international transactions from domestic ones.

With regard to the commercial sensitivity of the requested information, the Service argues that the field of secure electronic services is competitive, and that the release of volume information would give competitors knowledge about the Postal Service's progress and strengths in a growing but somewhat uncertain market. The Service argues that the Commission's complaint proceedings should not become vehicles for the public disclosure of such competitive information.

I disagree with the Postal Service's claim that information regarding the volume of Post E.C.S. transactions is categorically irrelevant in this complaint proceeding. While the Presiding Officer in Docket No. C96-1 found such information to be irrelevant to determining the "postal" character of the Pack & Send service, his finding was predicated on the observation that, "[a] determination that Pack & Send service is 'postal' would not depend on establishing any particular number of transactions *or any particular dispersion among facilities*." P. O. Ruling No. C96-1/5 at 4. (Emphasis added.) By contrast, in this phase of this proceeding the Commission has found that the dispersion of Post E.C.S transactions between wholly domestic and international categories bears importantly on the application of Chapter 36 to the Post E.C.S. service. Order No. 1258 at 4-5. Consequently, as a general matter, information regarding the respective origins and points of receipt of Post E.C.S. transactions is, potentially, highly relevant in this case.

However, in light of the Postal Service's representations regarding the potential commercial sensitivity of such information, I am reluctant to direct its production without further clarification of its potential admissibility as evidence and the possible adoption of appropriate protective conditions. Consequently, I will withhold a ruling on Complainant's motion to compel pending additional input from interested parties. Complainant, the Postal Service, and any other party interested in this controversy should be prepared to discuss these matters during the prehearing conference on August 10.



UPS/USPS-15-17. These interrogatories request information bearing on the extent to which users of Post E.C.S. service have substituted it for their use of hardcopy postal services. The first interrogatory asks whether this has occurred, and for the provision of all data concerning such substitution. The second asks whether any Post E.C.S. customer's use of Express Mail, Priority Mail, or any other postal service has declined since it began using Post E.C.S., and for all data concerning such situations. The last interrogatory requests disaggregated volume data for each Post E.C.S. customer's use of Express Mail, Priority Mail, and any other type of mail for two time periods. The Postal Service objected to all these interrogatories on the grounds of commercial sensitivity and relevance. In its objection, the Service also represents that it "has no quantitative data responsive to this request," but it "has identified written customer feedback..., as well as reports of the usage of two customers, as potentially responsive to this request." Postal Service Objection of May 25 at 17. In its Motion to Compel of June 8, Complainant argues that the requested information is highly relevant on the issue of the extent to which Post E.C.S. and pre-existing postal services "are functionally and economically interchangeable." Motion to Compel at 17. UPS also notes that it does not request the identity of customers, so that concerns regarding commercial sensitivity are unwarranted.

I agree with Complainant that information responsive to these interrogatories would likely be highly relevant to establishing the potential substitutability of Post E.C.S. for pre-existing hardcopy postal services, which would bear on the intrinsic utility and value of Post E.C.S. Indeed, the Commission posed questions on these subjects in Order No. 1229.<sup>3</sup> Therefore, I shall direct the Postal Service to provide whatever responsive information it possesses, with the identities of any users of Post E.C.S. or other postal services redacted.

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<sup>3</sup> Order No. 1229, Order Requesting Supplemental Information, February 17, 1999, at 2-3 [Questions (3)(a) and (b)].

UPS/USPS-34. This interrogatory asks the Postal Service to state whether the Service's electronic postmark is available, or will be available, in conjunction with any products other than Post E.C.S., and to identify all such products. The Service objected on the grounds of relevance, commercial sensitivity, jurisdiction (in part) and privilege (in part). In its Motion to Compel of July 20, UPS argues that the requested information is relevant because it would allow comparison of Post E.C.S. with other services that are admittedly "postal" in nature, such as Mailing Online and Post Office Online, as well as shedding light on the issues of substitutability and the use of common resources. Complainant also argues that the Service's claims of commercial sensitivity, lack of jurisdiction over foreign posts, and privilege are baseless.

In this phase of the proceeding, the Commission's primary focus is on the intrinsic nature or character of Post E.C.S. service as a potential "postal" service. Consequently, I agree with the Postal Service that the relevance of information concerning the extent to which one feature of Post E.C.S. may be available for other services is too remote to warrant its production, particularly in light of the potential sensitivity of the Postal Service's product plans. Therefore, I shall not compel the Service to respond to this interrogatory.

UPS/USPS-41. This interrogatory asks whether it is the Postal Service's position that interception of a Post E.C.S. transmission is a federal crime, and if so, to identify the federal statute that it violates. The Service objected on the grounds that the question is irrelevant and improperly seeks a legal conclusion. In its Motion to Compel of July 20, Complainant argues that the interrogatory seeks relevant information because a Postal Service affirmation that interception violates a federal law regarding the integrity of the mails would tend to establish that Post E.C.S. is "mail." UPS also cites Commission practice and section 25(c) of the rules, which states: "An interrogatory otherwise proper is not necessarily objectionable because an answer would involve an opinion or contention that relates to fact or the application of law to fact...."

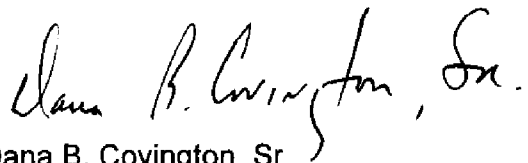
This interrogatory poses an interesting and potentially relevant question regarding the applicability of criminal statutes intended to protect the integrity of the mails to the all-electronic Post E.C.S. service. An answer would necessarily dwell in the realm of legal opinion. In order to have the benefit of additional views on this issue, I shall defer a ruling on this interrogatory until after the prehearing conference on August 10, as section 25(c) explicitly allows.<sup>4</sup> Complainant, the Postal Service, and other interested parties should be prepared to address this matter at the prehearing conference.

### RULING

1. The Motions of United Parcel Service to Compel Responses to Interrogatories are granted with respect to Interrogatories UPS/USPS-15-17, 27-28, 30, and 43.

2. The Motions of United Parcel Service to Compel Responses to Interrogatories are denied with respect to Interrogatories UPS/USPS-1(b)-(c), 7, 25-26, 29, 32-34, 36-40, 42, and 45, without prejudice to their resubmission in a subsequent phase of this proceeding.

3. Rulings on the Motions of United Parcel Service to Compel Responses to Interrogatories UPS/USPS-2, 3(b)-(c), 4-6, 10-14, 20(a), 31, 41, and 44 are deferred, as provided in the body of this ruling.



Dana B. Covington, Sr.  
Presiding Officer

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<sup>4</sup> Section 25(c) provides that, "the Commission or presiding officer may order that such an interrogatory need not be answered until a prehearing conference or other later time."